

## PFAS Regulation, Litigation May Be Shaped By Media Claims

By Jessica Deyoe, Suzanne Englot and Alexandra Fraher

(March 5, 2020, 7:59 PM EST)

Per- and poly-fluoroalkyl substances, or PFAS, are a collection of over 7,000 manmade chemicals. The original PFAS chemical compounds were created in the 1940s, with thousands of additional compounds developed over time. PFAS have unique physical properties, including high resistance to heat and degradation, and incredible ability to repel water and oil — all of which led to PFAS being nicknamed the “forever chemicals.”

However, the beneficial characteristics that make PFAS useful in a plethora of commercial applications are also the reason PFAS are the subject of biopersistence and human health concerns.

Federal and state governments are beginning to regulate PFAS. At the same time, courts are experiencing an influx of environmental and personal injury cases with PFAS manufacturers as the primary defendants. Amid these regulatory and litigation developments, the public is being inundated with sensationalized PFAS media that is creating panic and fear.

Nevertheless, it is the media coverage of PFAS that may ultimately act as the catalyst for lawmakers to regulate PFAS. At the same time, this same pressure may cause overregulation before a scientific consensus on PFAS harms is reached.

### Regulation of PFAS at the State and Federal Level

Multiple states have begun regulating PFAS on a state level rather than waiting for the federal government to take the lead. California, Colorado, Massachusetts and New Jersey, among other states, have begun gathering data on local water quality, doing notice and comment rulemaking, holding public hearings and implementing drinking water standards.

Many state officials believe that PFAS are most effectively regulated by the states, as they have more flexibility than the federal government to adapt to the quickly evolving science and pushback from the public on PFAS. With a lack of scientific consensus on testing methodology or permissible exposure levels, though, the state regulations thus far



Jessica Deyoe



Suzanne Englot



Alexandra Fraher

differ considerably — a trend likely to continue until the federal government is in a position to lead the charge.

Congress has expressed interest in regulating PFAS by introducing several different bills with varying levels of proposed stringency (and varying levels of support). However, in an arguably preemptive action, the U.S. Environmental Protection Agency declared its intention to regulate PFAS in February 2019, with the release of its PFAS Action Plan.

This plan lays out a series of short-term and long-term action items, including the release of agency guidance on cleanup and testing methodologies, assessments leading to regulation of PFAS under a number of environmental acts, and continued research and development surrounding the potential effects of PFAS on human health and the environment.

To date, the EPA's progress on the PFAS Action Plan items has been slow, due in part to open-ended deadlines and pushback from the White House. The EPA fully accomplished some items before the close of 2019, with other items remaining partially complete.

The agency proposed a PFAS testing method for water matrices, updated its CompTox Chemistry Dashboard to include PFAS properties, and developed a new drinking water testing method to quantify PFAS. Several other action items have been initiated — including compilation and release of research studies, creation of an enforcement strategy under the Toxic Substances Control Act, and collaboration with industrial and federal facilities to work toward adding PFAS to the Toxics Release Inventory — but these items are not yet complete.

Despite these initial steps, the action items leading to the most significant regulation and determination of responsibility are yet to come. The EPA has not yet submitted for interagency review a proposed list of PFAS to designate as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, the law that regulates hazardous waste cleanup and the creation of Superfund sites.

Designation of these chemicals as hazardous substances will impose cleanup responsibility on polluting parties. More significantly, it will reopen multiple previously closed Superfund sites for further testing and remediation.

A pattern of delays appears in the EPA's PFAS rulemaking, as well. The EPA missed its 2019 self-imposed deadline to finalize the toxicity assessments for GenX chemicals and perfluorobutanesulfonic acid, which are intended to characterize the public health risks from PFAS exposure and detail the information companies must disclose on their use and disposal of PFAS.

The EPA also failed to finalize a significant new use rule for PFAS by the end of 2019. This is a standard step in federal chemical safety protocol, which would help expand knowledge about whether new PFAS entering commerce are safe for consumption, and creates an additional regulatory hoop to jump through in the production of new consumer and commercial products.

Despite delays, the EPA continues to proclaim its intention to regulate PFAS. On Feb. 20, 2020, the agency announced its first priority item listed in the PFAS Action Plan: reducing regulatory uncertainty by proposing a national drinking water regulatory determination (a few months after the agency's self-imposed deadline). The regulatory determination is the next crucial step in implementing a maximum contaminant level of PFAS allowed in public drinking water.

The EPA's continued progress in completing the PFAS Action Plan items will reduce public and industry uncertainty surrounding these substances. While these delays have lessened citizens' confidence that the federal government prioritizes public health and environmental protection, the EPA's efforts to continue implementing the action items does show good faith effort.

As with all federal initiatives, slow and steady should be the expected pace for PFAS regulation in 2020 and beyond. It remains to be seen how the regulatory scheme balances out between state and federal responsibility.

### **Past and Future PFAS Litigation**

As the federal and state governments work to address PFAS, the courts are forced to navigate the uncharted waters of PFAS litigation without regulatory guidance. New lawsuits brought against the companies that created PFAS have largely fallen into two distinct categories: personal injury claims, and environmental contamination and remediation claims brought by government authorities on behalf of their residents.

The personal injury PFAS cases were first filed in 2001, when residents in Parkersburg, West Virginia, sued DuPont Co., alleging injuries from PFOA contamination in waterways surrounding DuPont's Teflon manufacturing facility. During this suit, DuPont convened a panel of scientists to investigate potential links between PFOA and certain illnesses.

The science panel concluded that there was a probable link between PFAS exposure and the development of kidney and testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension and high cholesterol. The case settled in 2017 for \$671 million, marking the first successful class action personal injury lawsuit against a PFAS manufacturer.

The success of the case against DuPont initiated a flurry of class actions against PFAS manufacturers across the country. There are currently hundreds of lawsuits specific to PFAS-containing aqueous film-forming foams, or fire-fighting foams, brought in multidistrict litigation in South Carolina and Ohio.

In addition to personal injury suits, PFAS litigation is increasingly seeing more lawsuits related to environmental contamination and remediation brought by states on behalf of their citizens. In 2010, Minnesota brought the first such suit against 3M Co. for negligently discharging PFAS used in the manufacture of Scotchgard into sources of drinking water. This case settled in February 2018 for \$850 million.

Shortly thereafter, in July 2018, Michigan's governor requested that the state's attorney general pursue litigation against PFAS manufacturers. In January of this year, less than two years after the governor's request, Michigan Attorney General Dana Nessel sued 17 companies that manufactured PFAS.

The complaint alleges causes of action under the Natural Resources and Environmental Protection Act, the Michigan Fraudulent Transfer Act and Michigan's laws of negligence, trespass, public nuisance and unjust enrichment. This case will likely take years to resolve, but will shape the future of PFAS litigation.

Increasing attention by state agencies and environmental watchdog groups on PFAS contamination from leaching and emissions into the air provide the most likely next wave of litigation claims for PFAS manufacturers and companies that used PFAS in manufacturing processes. These cases will starkly

expand the nature of the PFAS claims from the current litigation trend, which focuses predominantly on water discharge allegations.

It is this shift to expand the pool of possible claimants beyond the traditional waterway discharge defendants to inland manufacturers that will signal the beginning of the second wave of PFAS litigation — lawsuits against any companies that use or used PFAS in manufacturing consumer and commercial products, since containing and properly disposing of PFAS is so incredibly difficult.

We will also see increasingly creative PFAS lawsuits as parties grapple with determining what the best avenues are for relief. For example, in May 2019, New Hampshire filed the first suit seeking statewide compensation for PFAS contamination. In addition, New Mexico filed suit against the United States for violating the New Mexico Hazardous Waste Act through PFOS and PFOA contamination originating from two U.S. Air Force bases.

In California, nonprofits have filed suit against the U.S. Department of Defense, alleging that the government did not run a proper environmental review before awarding contracts for burning millions of gallons of PFAS-containing firefighting foam, which importantly marked the first PFAS air pollution suit in a sea of water contamination-related litigation.

### **Effect of Public Perception on PFAS Regulation and Litigation**

As regulations are developed and litigation of PFAS claims increases, current and potential defendants face a firestorm of negative PFAS media. Articles regarding the presence of PFAS in our waterways and the impact this may have on the public are making regular appearances in all major news sources.

The articles are creating a sense of panic among the public, as the articles are often focused on the more severe suspected health impacts that may come from exposure to very high levels of PFAS, while ignoring the fact that low levels of PFAS exposure may not be harmful.

At the same time, movies like the documentary “The Devil We Know” and the blockbuster film “Dark Waters” use famous actors, including Mark Ruffalo and Anne Hathaway, to further dramatize and sensationalize the PFAS issue. The movies frame the manufacturers of PFAS as part of an enormous conspiracy intent on covering up of the harms of PFAS, which the films claim have led to tens of thousands of injuries.

While the scientific and medical evidence regarding the impact of exposure to PFAS is in its infancy, these articles and movies are causing an oversensitivity to the presence of any PFAS. This fear not only creates bias in future jurors, but it is also mobilizing environmental lobbyists to push for immediate development of PFAS regulations.

Government officials at both the federal and state levels are experiencing this pressure, and are perhaps too quickly developing threshold levels for PFAS in waterways based on unsound and inconsistent scientific evidence. This is not the first time that negative public relations and media have impacted public perceptions of an environmental issue.

However, the ability to instantaneously share and spread information through social and other modern media avenues has resulted in more rapid development of the PFAS movement. Regulators and lawmakers do not have the luxury of time when articles and movies peddling the extreme harms allegedly associated with PFAS exposure are shared quickly to the masses, adding to the public

perception that PFAS regulation is a dire issue that must be addressed immediately.

This does not allow for the development of sound and verified scientific and medical studies to fully evaluate the harms allegedly related to PFAS exposure, which would allow lawmakers to develop and implement PFAS rules that are effective. Instead, lawmakers are forced to make do with the best available scientific evidence currently at their disposal, no matter how uncertain, to develop useable interim regulations while the public scrutinizes every action or inaction.

It is the media machine that will ultimately drive PFAS regulations forward, but may do so at a pace that, while appealing to citizens, is not supported by the majority of the scientific community.

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*Jessica Deyoe, Suzanne Englot and Alexandra Fraher are associates at CMBG3 Law LLC.*

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